FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1938.

No. 73.

STATE OF MINNESOTA, by Its Attorney General, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR STATE OF MINNESOTA.

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A.

STATEMENT.

This reply brief is submitted pursuant to the Court's permission after completion of argument.

B.

ARGUMENT.

I.

Section 4 of the Act of March 3, 1901, 31 Stat. 1084, (25 U. S. C. A. 311) does not specifically apply to condemnation proceedings nor can it be so implied. The State's brief thoroughly covers the distinguishing features and proper interpretations of the Act of March 3, 1901 (31 Stat. 1084).

The Government now attempts to read into Section 4 of the Act of March 3, 1901 language relating to or which would permit condemnation proceedings as evidenced by its brief (p. 19) wherein it is stated:

> "Rather the provision of paragraph 2 of Section 3 that allotted lands may be condemned 'for any public purpose' should be taken as qualified, as regards condemnation for highways, by the more specific provision of Section 4 that Indian lands can be condemned for highways only with the permission of the Secretary."

It is apparent that this strained, unreal, unnatural and forced interpretation of the Act as advanced by the Government is not in any sense whatsoever the interpretation heretofore placed on the several sections of the Act by the United States through its Department of Interior. We again refer the Court to the Department's regulations concerning rights of way over Indian lands, Section 69, which provides:

> "Any project for which private lands could be condemned under State laws is held to be a public purpose within the meaning of the Act of March 3, 1901, above cited."

The words "is held" obviously mean the holding of the Department of Interior, its interpretation, its decision, its construction and its definite finding. It is clear that if highways were to be excepted from the all inclusive clause "any public purpose" as contained in Section 3 of the Act of

March 3, 1901 (25 U. S. C. A. 357), then certainly the Department interpreting said Act would have so stated under said Regulation 69.

Regulation 69½ adopted in the General Revision of April 7, 1938, and quoted in the Government's brief (footnote, p. 32) is very enlightening in that this regulation does not in any respect change, modify, amend or abrogate, increase or diminish in any respect said Regulation 69, above quoted.

The intent and interpretation of the Department of Interior of Section 4 is definitely and emphatically stated again in these regulations concerning rights of way over Indian lands appearing on page 8 thereof under the heading "Public Highways" Nos. 49 to 52, inclusive. These regulations do not mention or refer in any manner to condemnation. On the contrary, Section 52 particularly describes the manner and method of the assessment for damages to be paid to the Indians, such damages to be ascertained by the Department through its superintendent or other officer in charge. This is wholly a departmental function and no procedure is set up or contemplated permitting assessment of damages through court or condemnation procedure.

II.

Conveyance of Quodonce Tract, Parcel 5, is subordinate and subject to the State's condemnation proceeding.

The State did not raise this point in its brief before this Court. However, the Quodonce conveyance was definitely brought before the lower District Court, as well as the Circuit Court. The Federal District Court considered this question and made its finding No. V (R. 65) as follows:

> "That on March 12, 1936, Paul Quodonce executed a certain deed purporting to convey to the United States, in trust for the Grand Portage Band of Chippewa Indians, all of his right, title and interest in and to Parcel 5 above described; that the said conveyance was made subsequent to the filing of a Notice of Lis Pendens in

> the above entitled matter by the State of Minnesota and with notice of the pendency of this action, and that the said conveyance is void insofar as it affects the right of the State of Minnesota to proceed in this action, and the estate vested in the United States of America by the said conveyance is subject to the easement herein acquired by the State of Minnesota;"

The Circuit Court made no finding as to the Quodonce transfer, presumably on the theory that the Government's claim was without merit. The Federal Government has raised this issue in its answering brief and we now submit to the Court the State's argument as to such transfer. The State does not question the validity of such transfer but does claim that the transfer is expressly subject and subordinate to the State's condemnation proceeding wherein the State is seeking to acquire an easement for highway purposes over a portion of the Quodonce Tract.

The Government concedes in its brief (p. 40) that on February 20, 1936, when it accepted the Quodonce option that it had notice of the State's condemnation proceeding which was filed February 6, 1936. The State's notice of Lis Pendens was recorded on February 8, 1936, at Grand Marais at 9:00 o'clock A. M., Book 7, Miscellaneous 129 (R. 38). The deed from Quodonce to the tribe was dated March 2, 1936 (R. 53), about a month subsequent to the filing of the State's condemnation and over two years subsequent to the Commissioner of Highways center line and width orders locating trunk highway No. 61 over and across the allotted lands.

The Government now contends that it is not bound by the State's proceeding and that it can entirely ignore and set aside the rights and equity of the State. Does the United States stand in any better or different position than the State or a private individual would so far as the effects of the notice of Lis Pendens, the commencement of the condemnation proceeding and the filing of the center line and width orders? We think not. It is held in *Ward* v. *Con-*

gress Construction Co., 99 Fed. 598, 39 C. C. A. 669, that where the United States acquires property from a party to a pending suit, its rights in such property are subject to the result of the litigation the same as would be those of an individual. A sale of the premises during the pendency of the State's proceeding naturally and logically therefore would be subject to the equities of the State as may be determined by this court. If the Government's position is correct and that litigation in an action in rem, and notices of Lis Pendens filed in connection therewith, mean nothing to the United States, then obviously it at any time during the course of any condemnation proceeding, regardless of its nature, could effectively nullify and block such proceeding by a purchase of the lands affected.

III.

The Indian Reorganization Act does not repeal by implication or otherwise the second paragraph of Section 3 of the Act of March 3, 1901 (25 U. S. C. A. 357).

The Government maintains that the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, (25 U. S. C. A. 461 et seq.), repeals Section 357. Such argument is wholly untenable as there is and has been no repeal, express or otherwise, whatsoever of said Section 357. On the other hand, as aptly stated in the brief *amicus curiae* (p. 5) that so far as Indian allotments are concerned, the Reorganization Act merely extends the periods of trust on such lands until otherwise directed by Congress. See Section 2 of the Act (25 U. S. C. A. 462). In so far as allotted Indian lands are concerned the Reorganization Act does in no manner affect same except to the extent above stated, i. e., the indefinite extension of trust patents, which necessarily would mean and definitely imply that all existing laws regarding lands allotted to Indians remain in full force and effect.

The Government's theory of repeal by implication of Section 357 supra, by the Reorganization Act was advanced

and argued both before the Federal District Court and the Circuit Court of Appeals. Neither court makes any finding as to the Reorganization Act and by inference we may reasonably assume that the courts did not consider said Act an issue in this case. The legal principle that repeal by implication is not favored is so well known, and cases to that effect so numerous, that the State deems it unnecessary to make any citations whatsoever.

IV.

The Treaty of September 30, 1854, authorized State condemnation and is not repealed by subsequent acts of Congress.

The Government likewise claims a repeal by implication of the last sentence of Article 3 of the Treaty. No authority is cited as to this contention. The provision of the treaty which permits all necessary rights of way for highways and railroads through any of the reserved tracts provided compensation is made as in other cases is greatly similar to like provisions found in other Indian treaties. An examination has been made of many such treaties and we find almost invariably a provision for the opening and establishment of roads, railroads and rights of way for other public purposes. Some grant the rights of way along section lines and others grant free rights of way. Unquestionably rights of way for many purposes have been acquired under such treaty terms, and if the treaty is repealed by implication the result would be to nullify established and vested rights. The Government claims that this basic covenant dealt with rights only as between the Chippewas and the United States and did not grant to the states or to private individuals rights as against both. This argument is without merit as it is common knowledge that the Government has not built any railroads, nor does it usually open and establish public highways. This clause of the treaty should be interpreted in its ordinary sense and would therefore constitute

a standing invitation to the establishment of all necessary roads, highways and railroads over the tracts by purchase or condemnation. The Government further contends in its brief that compensation as defined by the treaty means that where lands are taken away for that purpose the Indian receives compensation in the form of other lands. Article 3 concerning the exchange of lands definitely limits such exchange to mineral lands. It is contended that the phrase "compensation being made therefor as in other cases" is plain and clear, and means that the Indians be compensated either through the medium of purchase or through condemnation proceedings, and cannot be construed as being limited solely to the exchange of lands. The Government claims the repeal of this treaty provision by implication by the Act of March 3, 1901, as well as the Reorganization Act. As heretofore discussed none of these acts expressly repeals, nor can they be construed to repeal by implication this clause of the treaty.

V.

Other condemnations by the State of Minnesota over allotted Indian lands.

The State's brief (p. 22) calls attention to other condemnations of allotted Indian lands for highway purposes within the past ten years. Particular reference is made to the statement that in these other cases the Department of Interior fully cooperated with the State. The writer is informed by the Minnesota Highway Department that such other condemnation proceedings were filed in the regular manner in state courts and that no written consent was requested or received by the Indian agency or the Department of Interior. In other words, such condemnations were instituted and completed without such consent. However, the Department of Interior did cooperate in that at the time the commissioners appointed by the court viewed the premises for appraisal purposes that usually a representative

of both the state and the superintendent of the Indian agency accompanied the commissioners. This was done so that the Indian agent or representative could give full information to the commissioners as to damages, which was apparently successful as we know of no cases in which any appeals were taken from the awards of damages. This likewise permitted the condemnation proceedings to be carried on to an early conclusion. After the filing of the Commissioners' report as to damages, vouchers were obtained from the state treasurer and same were transferred to the local Indian superintendent, for payment to the allottees, at which time an application was likewise made to the superintendent of the Indian agency for the right of way across the lands, in order to fully cooperate with the Indian agency and the Department of Interior, and "double barrel" the taking of the lands. This, however, was not done until after the condemnation proceedings were completed. Such procedure subsequent to condemnation proceedings to fortify the title of the condemnor is common practice in Minnesota. As to the effect of this practice, the Minnesota Supreme Court in *Dow-Arneson Co.* v. *City of St. Paul*, 191 Minn. 28, 253 N. W. 6, said:

> "The fact that the city took a deed when its condemnation proceedings had culminated did not change the fact that title passed to it under the condemnation. It might fortify itself with the deed without in any way forfeiting what had been acquired by the proceedings, the legality of which is not seriously questioned."

The writer is informed that in earlier condemnation proceedings for highway purposes no distinction was made between Indian lands and other fee owned lands on the project involved. In other words, where a condemnation was started and there were both Indian and privately owned lands involved, such Indian lands were included in the same proceeding. In later proceedings had affecting Indian lands such lands were acquired in a separate condem-

nation. While the Federal Government's consent was not either secured or granted as to any of these condemnations, neither has there been any objection by the Federal authorities as to any of the condemnations filed on Indian lands. In fact usually a representative of the Indian Bureau attended the court proceedings.

To summarize, therefore, both the State and the Department of Interior fully cooperated in the other proceedings. The State started its proceedings without consent but did naturally serve the Indian agent and the individual Indians, who were duly represented in all respects by the Department of Interior and its agents. At the time of oral argument, this Court requested the Federal Government to furnish information as to the other condemnation proceedings brought and successfully concluded by the State of Minnesota as stated in the State's brief (p. 22). The foregoing is submitted for the Court's further information, particularly with respect to the nature and manner of procedure, as well as to evidence the State's full cooperation with the Department of Interior concerning the acquirement by condemnation of such allotted lands for a public purpose.

C.

CONCLUSION.

WHEREFORE, the State prays that the Circuit Court be in all things reversed and the Federal District Court be in all things affirmed.

Respectfully submitted,

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